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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1963

No. 218

JOHN CARDILLO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

Supreme Court of the United States

October Term, 1962

No. .....

John Cardillo,

Petitioner,

—against—

United States of America,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

John Cardillo, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, made and entered the 24th day of April, 1963, affirming a judgment of conviction of petitioner in the United States District Court for the Southern District of New York (Thomas F. Murphy, Judge, sitting without a Jury).

Opinion Below

The opinion of the United States Court of Appeals which affirmed the judgment of conviction of petitioner, is not yet officially reported, —— F. 2d ——, September Term, 1961, No. 365, opinion pages 3397 to 3415 inclusive. A copy of said opinion accompanies this petition in the Appendix annexed hereto.

Petitioner John Cardillo, *et al.*, appealed from judgments of conviction for violation of 18 U. S. C. §§2, 371, 2314, 2315, through the interstate transportation of stolen furs, the interstate receipt of stolen furs, and conspiracy to do the same.

Petitioner appealed from the judgment of conviction and sentence of five (5) years imprisonment imposed upon him on November 3, 1961, after he was found guilty of counts 3 and 4 under indictment No. 60 Cr. 988, on September 28, 1961. Petitioner is currently at liberty on bail pursuant to the issuance of a stay of the mandate. Petitioner requested and obtained an order extending the time to file his petition for a writ of certiorari to and including June 22, 1963; which order was issued by Associate Justice John M. Harlan, of the Supreme Court of the United States.

Jurisdiction

The judgment of affirmance of the United States Court of Appeals for the Second Circuit, which is sought to be reviewed herein was made and entered April 24, 1963. This latter judgment affirmed the judgment of conviction in the United States District Court for the Southern District of New York, which adjudged petitioner herein guilty on counts 3 and 4 and concurrent five year sentences were imposed upon petitioner.

The jurisdiction of this Court is respectfully invoked under Rule 19 of the Supreme Court Rules and Title 28 U. S. C., §1254(1) on the ground that review by the Supreme Court of the United States by writ of certiorari is sought on a judgment of affirmance on appeal by the United States Court of Appeals for the Second Circuit.

Certiorari is sought on the grounds that the United States Court of Appeals for the Second Circuit: a) has

rendered a decision on an important question of Federal Law in conflict with applicable decisions and controlling case law; b) has decided an important question of Federal Law which should be clarified and made more definite and certain by this Court; c) has decided said question in a way probably not in accord with the applicable decisions of this Court and with other Circuits; d) and/or because of the importance of the question for the administration of criminal justice in the Federal Courts. The records of proceedings before the United States Court of Appeals and the United States District Court have each been certified and forwarded to the United States Supreme Court.

Questions Presented for Review

1) Whether it was prejudicial error for the Trial Court to rule that petitioner was not entitled to receive certain statements.

2) Whether petitioner was deprived of due process of law by reason of the improper limitation of cross-examination of government's principal witness.

Concise Statement of Case

This case arose out of the alleged burglary of a fur shop in Paterson, New Jersey, on September 18, 1960. This appellant was not involved in any way in the alleged burglary and was not charged in the first and second counts of the indictment, which concern the alleged transportation of the stolen furs by three of the defendants from Paterson, New Jersey, to New York City.

The essence of the government's case against Cardillo (and against several other defendants) came from the lips of a co-defendant, Thaddeus Ohrynowicz, who had pleaded

guilty to all four counts of the indictment before Judge Murphy approximately three months before the trial of appellant and the other defendants. Judge Murphy had then sentenced Ohrynowicz to consecutive prison terms totaling ten years after his counsel had said he " * * * was willing and ready to admit his own guilt but was not desirous of involving anyone else * * *" (R. 1828).*

According to the testimony of Ohrynowicz, he and two other defendants, Louis Piselli and John Knapp, burglarized a fur store in Paterson, New Jersey, and separated following the burglary due to an unforeseen interruption of their crime, after having removed some furs from the store. Ohrynowicz left the scene alone, he said, and without any furs in his possession. He returned to New York City on the same day, September 18, 1960.

In New York City, Ohrynowicz testified, he saw the appellant, Cardillo, standing in front of a bar and told him, "We just got a rumble on a store in Jersey, a fur store, it was a considerable number of furs involved and I don't know what happened to the other guys who were with me" (R. 505). There was nothing said by Cardillo about this, and he said that he had not seen two men whom Ohrynowicz asked about. They talked about things in general for a few minutes. Then Ohrynowicz said, John Knapp arrived and spoke to him; Knapp explained how he and Piselli split up after the burglary and he, Knapp, had driven to New York alone with a bag and suitcase of furs (R. 506).

Then Ohrynowicz testified, he asked appellant, Cardillo, to use his car and remove the bags from the checkroom where they were then located (R. 507). Cardillo assented and rode in the car with Knapp and Ohrynowicz to the Port Authority Bus Terminal where Knapp picked up the bag and suitcase and brought them to the car, accord-

* R. refers to the original Trial Record on Appeal.

ing to Ohrynowicz (*ibid.*). Ohrynowicz said he then put the furs in his hotel room at the Henry Hudson Hotel and left them there (R. 508).

All of this testimony implicating Cardillo was contradicted by a statement Ohrynowicz gave to two agents of the F.B.I. on October 19, 1960 (Defendant's Exhibit J, App. 3a).* Oddly enough, Ohrynowicz swore on cross-examination that he had told the F.B.I. agents the truth in giving that statement (R. 581). This statement, discussed more fully below, says in substance that Ohrynowicz met Knapp in New York City on September 18th following the burglary and the two of them took the furs to Ohrynowicz's hotel. There is no mention of any participation by Cardillo or even any suggestion that he was present.

Subsequently, on September 19, 1960, Ohrynowicz testified, Cardillo came to a hotel room with one Paul Kramer, who examined the furs that were there and discussed prices with Ohrynowicz (R. 516, 530, 531). Other defendants, one of whom was acquitted by Judge Murphy, were present in that room. Ohrynowicz also testified that some time after the furs were sold by another defendant, by virtue of the efforts of other convicted defendants and without any participation of Cardillo, he gave Cardillo $150 (R. 533).

Paul Kramer testified that he was a manufacturer of fur-trimmed sweaters, who had met Cardillo when this appellant purchased a sweater from him (R. 717-719). Kramer said that some time in the middle of September, 1960, Cardillo had asked him to appraise some merchandise and that he accompanied him to a hotel room in the George Washington Hotel, where he saw Messrs. Donohue (who was acquitted at trial) and Ohrynowicz, and examined some

* Refers to page of Appendix of Petitioner in Court below.

furs (R. 722-724). After setting a figure as the value of these furs and some discussion about price with Ohrynowicz, Kramer left the hotel (R. 725). Kramer testified that he had two subsequent telephone conversations with Cardillo concerning his possible purchase of the furs. In the first conversation, he indicated some interest in the furs, but on the following day, he said, he rejected the notion of purchasing them (R. 725).

That comprised the prosecution's case against Cardillo, who was not involved in any way in any of the other dealings or transactions in this case.

Reasons Relied on for the Granting of the Writ of Certiorari

ARGUMENT

POINT I

Petitioner was deprived of a fair trial by reason of the improper restriction of the cross-examination of the principal prosecution witness.

There was serious, prejudicial error committed by the trial judge in restricting cross-examination of the principal prosecution witness. This error occurred both when the trial court erroneously instructed the witness, Ohrynowicz, concerning the scope of his privilege against self-incrimination and when he sustained objections to defense counsel's questions.

The cross-examination of the witness, Ohrynowicz, was particularly crucial to Cardillo's case because Ohrynowicz was the only witness who implicated this petitioner with testimony that might have been sufficient to warrant a conviction in this case.

At the outset of the cross-examination of Ohrynowicz, he admitted that he was arrested on October 1, 1960. Then, when he was asked whether he was fleeing from another burglary at that time, the trial judge volunteered this advice to him, "If this is a crime that they are talking about that you have not been convicted of, you have a constitutional right to refuse to answer any question that might tend to incriminate you on that charge". (R. 561). Petitioner's counsel pointed out to the trial court that he was entitled to explore other charges pending against Ohrynowicz and other criminal activity on his part in order to show a possible motive for falsification of his testimony (R. 563). It was repeatedly argued by petitioner's counsel that a witness in the federal court has no right to decline to answer a question on the basis of the Fifth Amendment to the United States Constitution where it is incrimination under state law that is feared (R. 565, 567). Nevertheless, the trial judge adhered to his erroneous interpretation of the Fifth Amendment and the witness, Ohrynowicz, curtailed the cross-examination by seeking refuge behind the shield improperly extended to him.

Over thirty years ago, the United States Supreme Court held that a witness is not entitled to rely on the privilege against self-incrimination extended by the Fifth Amendment simply because he fears prosecution for state crimes when he is being investigated by Federal authorities. *U. S.* v. *Murdock*, 284 U. S. 141, 149 (1931); cf. *Kiewel* v. *U. S.*, 204 F. 2d 1 (8th Cir. 1953). Recently the Supreme Court reaffirmed the rule that while the Fifth Amendment is a safeguard against the power of the federal government to compel self-incriminating testimony, it is no bar to an inquiry into state offenses. *Knapp* v. *Schweitzer*, 357 U. S. 371, 380 (1958).

It is always competent to cross-examine a witness to explore his bias or motive for testifying falsely. Even though the general scope of cross-examination is committed to the sound discretion of the trial court, if the trial judge completely cuts off a line of cross-examination which the defense is entitled to pursue, reversal must result. *Alford* v. *United States*, 282 U. S. 687 (1931).

In the *Alford* case, the Supreme Court reversed a conviction on the sole ground that the trial court had improperly curtailed cross-examination of a principal prosecution witness by refusing to let defense counsel ask where he resided. 282 U. S. 687, 693.

It made no difference, the Supreme Court held, that defense counsel had been informed that the witness was then in custody, because cross-examination is not merely a device to expand the knowledge of defense counsel, but serves to put information about the witness before the trier of fact. The Supreme Court said, concerning this vital right,

> "It is the essence of a fair trial that reasonable latitude be given the cross examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. *Tia-Koo-Yel-Lee* v. *United States*, *supra*; *King* v. *United States*, *supra*; *People* v. *Moore*, 96 App. Div. 56, affirmed without opinion, 181 N. Y. 524; cf. *People* v. *Becker*, 210 N. Y. 274. To say that prejudice can be established only by showing that cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a sub-

> stantial right and withdraw one of the safeguards essential to a fair trial. *Nailor* v. *Williams*, 8 Wall. 107, 109; see *People* v. *Stevenson*, 103 Cal. App. 82; cf. *Brasfield* v. *United States*, 272 U. S. 448. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. *Nailor* v. *Williams, supra*." 282 U. S. 687, 692.

Although stressing the fact that cross-examination is exploratory and that defense counsel need not generally indicate his purpose in pursuing any particular line of inquiry, the Supreme Court pointed out that defense counsel was entitled to show, for example, the possible bias of a prosecution witness which might stem from a hope of leniency in his mind. 282 U. S. 687, 693. When a trial court commits error in curtailing a line of cross-examination, it is obviously impossible to say what such a line of questioning would have elicited. That is why the Supreme Court held that when a trial court cuts off *in limine* inquiry concerning a subject which defense counsel is entitled to pursue, this is in itself an abuse of discretion and necessarily a prejudicial error. It need not be demonstrated that the inquiry would have shattered the witness or even have made an impact upon him.

In the present case, the witness, Ohrynowicz, was asked if at the time of his arrest he was being pursued by the police (R. 562). An objection by the prosecutor was sustained, although this question was manifestly preliminary and the desire of counsel to explore the relationship of this witness to the police, the F.B.I. and prosecuting authorities was stated on the record by petitioner's counsel (R. 562). Obviously such relationships and the pressures put upon him or the promises made to him could have serious impact upon the mind of the witness giving testimony for the prosecution.

Ohrynowicz acknowledged on cross-examination that a charge of breaking and entering with intent to steal was filed against him by prosecuting authorities in Essex County, New Jersey, following his arrest on October 1, 1960 (R. 566). But when petitioner's counsel asked him if he was guilty of those charges, the court again volunteered an erroneous instruction that Ohrynowicz had a right to refuse to answer such a question (R. 567). Naturally, Ohrynowicz claimed the benefit of that non-existent right and did not answer. In view of the trial court's repeated, erroneous interpretation of the Fifth Amendment, petitioner's counsel was granted a continuing exception instead of attempting to pursue this line of inquiry fruitlessly (R. 569).

Another question put to Ohrynowicz by petitioner's counsel asked whether he had committed other burglaries prior to October 1, 1960 (R. 569). At this point, the trial court sustained an objection by the prosecutor without any preliminary discussion and without any indication by the witness that he would decline to answer. Manifestly, this was an improper limitation of cross-examination. *United States* v. *Masino*, 275 F. 2d 129 (2nd Cir. 1960).

Another defendant's counsel asked Ohrynowicz if he had committed any burglaries between 1954 and 1960 (R. 660). Once again, Ohrynowicz relied on the supposed privilege extended to him by the trial judge and declined to answer. A motion for a mistrial by counsel for Cardillo on the ground that the defense was being denied a fair opportunity to cross-examine Ohrynowicz by reason of the judge's improper ruling, was denied (R. 660).

It is clear that if Ohrynowicz were guilty of other state crimes, aside from the one admitted in his direct examination, and subject to the action of other prosecuting authorities, this would furnish him with a strong motive to falsify

his testimony in this case to assist in convicting others and winning possible leniency in other forums. Ohrynowicz could reasonably have expected that the U. S. Attorney's office and/or the F.B.I. would intercede for him with other public authorities or at least point out to them his invaluable assistance in securing convictions in the federal court. This would probably have diminished or even eliminated the possibility of prosecution of Ohrynowicz by state authorities. It must be remembered that such a motive for falsification can spring from a variety of facts. Defense counsel is absolutely entitled to pursue prior criminal activity of a witness to show such motivation. *U. S.* v. *Masino, supra*, and *infra*.

When petitioner's counsel attempted to inquire on cross-examination into some of the details of Ohrynowicz's first conversation with agents of the F.B.I., he was again stopped as the Court sustained a prosecution objection (R. 576-577). At that point, the specific question pertained to the subject of any possible discussion between the F.B.I. agents and Ohrynowicz concerning his right to counsel. Certainly the beliefs, fears and hopes that a man entertains concerning his personal rights when he is questioned by investigating agents are bound to influence his attitude then, and are likely to have an impact upon his later role as a witness, if he becomes one. Judge Murphy expressed the view that even if a prosecution witness had been beaten into confessing and later testified as a result of that beating against others, their counsel would have no remedy. This seems an astounding point of view because of the obvious way in which such pressure could affect a witness's propensity to falsify. Perhaps because Judge Murphy held this view he sustained this objection (R. 577). Surely if a witness entertains any bias, fear, hope of reward, hatred, or the like, these subjects are all within the legitimate scope of cross-examination to expose his possible motive to falsify.

The trial judge erred again in denying petitioner's counsel another opportunity to test the motives of the witness Ohrynowicz.

The motives of Ohrynowicz to testify falsely should have been explored most thoroughly on cross-examination, not only because he was a self-declared accomplice of most of the defendants, and a thrice-convicted criminal, but also because he had indicated very strongly that he was a person whose potential for cooperation was influenced by his hope of reward. When Ohrynowicz was questioned by the F.B.I. while still a state prisoner, he told the agents, " * * * he does not want to spend any time in jail and inquired as to whether or not he would be sent to jail if he cooperated fully" (R. 583).

On cross-examination, Ohrynowicz flatly denied that he had told the F.B.I. that he wanted to cooperate so that he would not have to spend any time in jail (R. 581).

Another indication of the importance of this witness's desire to save himself at the expense of others may be found in the circumstances surrounding his sentencing on June 7, 1961 before the same judge who tried this case. At that time, Ohrynowicz' counsel asserted on his behalf that he " * * * was willing and ready to admit his own guilt but was not desirous of involving anybody else * * *" (R. 1828), and, his lawyer added, Ohrynowicz, " * * * has steadfastly maintained the position that he will admit his own guilt but he will not attempt to involve anyone else and thereby possibly save himself a sentence or lessen a sentence that would be imposed" (R. 1830). At that time, the prosecutor told the sentencing judge, " * * * I spoke to the defendant [Ohrynowicz] for a moment or two back here in the cell block, and he told me that cooperation was just out of the picture and he was insistent on pleading guilty and being sentenced" (R. 1834).

Just two days after his sentencing to prison terms totaling ten years, Ohrynowicz was before the federal grand jury saying: "'This is why I am in here talking. He [my lawyer] told me that if you take a plea with this judge you are not going to get any more than three years'" (R. 667). At trial, Ohrynowicz denied that anyone had made any promise to him regarding his possible sentence (R. 613).

The great value of cross-examination, or even the introduction of collateral evidence to test the bias of a witness or his motive for falsification has long been recognized. See *Gordon* v. *United States*, 344 U. S. 414 (1953). The Supreme Court reversed the conviction on two grounds in *Gordon*, one being the trial court's prevention of the introduction of evidence concerning his urging of a defendant who then became a prosecution witness to tell all that he knew.

In *United States* v. *Lester*, 248 F. 2d 329 (2nd Cir. 1957), the sole ground for the reversal of a conviction by this Court was that the trial judge had not permitted defense counsel to elicit testimony on cross-examination tending to establish a motive to falsify on the part of the principal prosecution witness. A trial court's ruling that a prosecution witness who had testified concerning bribes paid to the defendant could rely on his privilege against self-incrimination to decline to disclose the names of others whom he had bribed was held to be an improper restriction of the right of cross-examination. *Montgomery* v. *United States*, 203 F. 2d 887, 891 (5th Cir. 1953).

In the case at bar, of course, Judge Murphy never advised Ohrynowicz when he was giving testimony on direct examination for the prosecution about a burglary he perpetrated in New Jersey and as to which charges were still pending against him (R. 566-567), that he had any supposed privilege against self-incrimination because he might

be convicted in the state court on his own testimony. It seems remarkable, therefore, that the judge volunteered such an instruction only when Ohrynowicz began to be questioned about possible state violations in the course of cross-examination.

Cross-examination in criminal cases in the federal courts is properly allowed to be broad and far-ranging, particularly in the case of prosecution witnesses who are themselves criminals, so that the trial in effect can properly assess their testimony in the light of its motivation. *United States* v. *Masino*, 275 F. 2d 129 (2nd Cir., 1960); *Montgomery* v. *United States*, *supra*. In *Masino*, this Court stressed the impropriety of curtailing cross-examination of prosecution witnesses concerning their motives to falsify, saying, "When a witness in a criminal case is being questioned as to his possible motives for testifying falsely, wide latitude should be allowed on cross-examination. Cross-examination is proper when its purpose is to reveal bias or interest on the part of the witness being examined." 275 F. 2d 129, 132. The principle that prior illegal acts which have not resulted in conviction may be the subject of cross-examination in criminal cases to disclose motive for falsifying was approved there. One of the substantial errors this Court found in reversing *Masino* was the trial court's refusal to permit cross-examination of a vital prosecution witness as to whether he had sold heroin on another day. Two counts of an indictment against him involving that occasion had been dismissed after he had pleaded guilty to a third count. In holding this kind of limitation of cross-examination concerning prior illegal activity improper, this Court said, "Indeed, where the principal witnesses appearing on behalf of the prosecution have a criminal record or have engaged in criminal practices and are accomplices to the crime charged,

it is essential to a fair trial that the court allow the defendant to cross-examine such witnesses as widely as the rules of evidence permit." 275 F. 2d 129, 133.

These cases illustrate the application of the principle that cross-examination is a matter of right of a defendant, not a matter of grace extended by a trial court. Cross-examination is often asserted to be the "surest test yet devised of the truthfulness of a witness' testimony, and its allowance is especially important in the case of a witness who is himself an admitted violator of the law." *Montgomery* v. *United States*, 203 F. 2d 887, 891. Because this petitioner was deprived of the proper use of this right of cross-examination of the witness whose testimony was essential to his conviction, he should be granted a reversal.

This is not a case where petitioner's counsel was engaging in a particularly vicious or discursive attack on Ohrynowicz, nor indeed did any other lawyer who examined him do this. Ohrynowicz had admitted to two prior convictions involving armed robbery and burglary and he had given testimony concerning his role in a third burglary in this case. Surely it was not improper for defense counsel to probe concerning his other criminal activities, particularly burglaries since they knew he had been arrested for at least one other burglary, on October 1, 1960. Cross-examination concerning prior criminal activity of a witness like Ohrynowicz is not based upon the fact that the admission of such activity in itself has impeaching value, but rather because such information is highly relevant in evaluating the motivation of such a person to give false testimony.

Cross-examination is necessarily exploratory, in large part, as the Supreme Court has recognized. *Alford* v. *United States*, 282 U. S. 687, 692 (1931). We cannot say precisely what would have happened if defense counsel had been allowed properly to explore the background and mo-

tivation of Ohrynowicz for testifying. But certainly, the restriction of cross-examination cannot be said to have been harmless error because no one can say certainly what would have turned up. Obviously the court below could not speculate about the operation of Judge Murphy's mind, and conclude that no matter what damaging admissions he heard from or about Ohrynowicz he would necessarily have accepted and believed his testimony.

It would have been very simple for the trial judge to have allowed the proper cross-examination of Ohrynowicz. Certainly in view of Ohrynowicz' criminal past, his explicit desire to avoid serving time in jail, and the fact that he was the only witness to supply the key evidence against Cardillo shows that this appellant was entitled to wide latitude in cross-examination. The improper ruling of the trial judge concerning the privilege against self-incrimination permitted the witness to curtail his own questioning and this, coupled with the improper sustaining of some of the prosecution's objections, improperly limited appellant's right of cross-examination and entitles him to a new trial. The Court below reiterated the eminently fair doctrine that in a criminal case every proper means of ascertaining the truth should be placed at the defendant's disposal. *U. S.* v. *Freeman*, 302 F. 2d 347 (2nd Cir. 1962). Certainly the appellant in the case at bar was deprived of the proper exercise of his right of cross-examination, one of the principal weapons for determining the truth and, therefore, his conviction should be reversed.

It is elementary that a defendant in a criminal trial is entitled to conduct an especially searching cross-examination of a prosecution witness who is a co-conspirator or accomplice. *Moyer* v. *United States*, 78 F. 2d 624 (C. C. A. 9, 1935); *Stanley* v. *United States*, 245 F. 2d 427 (C. A. 6, 1955).

Also, as is enunciated by *Wigmore, on Evidence* (3rd Ed.), § 1391, the testimony of a witness who refuses to submit to full cross-examination is subject to a motion to strike in a proper case. Accord: *United States* v. *McKeown*, 19 F. Supp. 639 (D. Ky. 1937); *Stephan* v. *United States*, 133 F. 2d 87 (C. C. A. 6), cert. den. 318 U. S. 781; cf. *Jansson* v. *Larsson*, 30 App. D. C. 203 (1907).

The defense in this trial did move to strike the testimony of Friedman on the grounds indicated, but the motions were denied (J. A. 74a-75a*).

Cf. also, *Summit Drilling Corp.* v. *C. I. R.*, 160 F. 2d 703, 706 (C. C. A. 10, 1947), recognizing the rule that a witness' refusal to testify concerning a privileged document constitutes a cutting-off of the right to cross-examination and is ground for a motion to strike the direct testimony.

It is submitted also that, by fair analogy, indeed by analogy *a fortiori*, the rule should be applied here to a non-defendant witness which is applied to defendant-witnesses themselves, to the effect that if the witness takes the stand his right to invoke the privilege as to present or prior self-incrimination is waived. Friedman here testified as a self confessed co-conspirator. Cf. *United States* v. *Gottfried*, 165 F. 2d 360, 367 (C. C. A. 2), cert. den. 333 U. S. 860, 883 (collecting the cases).

We submit that the language of the Court of Appeals in *United States* v. *Mahoney*, 262 F. 2d 535, 537 (C. A. 2, 1959), is applicable here *mutatis mutandis*:

> "* * * we must confess that the situation is one in which either alternative results in prejudice to one side or the other; and it is impossible, so far as we can see, to lay down any general rule that will cover all instances. In the case at bar * * * it seems to us

* Refers to pages of Margolis' Joint Appendix in Court below.

that the interest of the accused should prevail over that of the prosecution, and that the judgment should not stand, for the questions touched vital elements of the charge. * * * "

Circuit Judge Clark, although concurring in the result did reluctantly do so (App. pp. 37-38*). In the aforesaid separate concurring opinion, Judge Clark stressed that "it is this very evil which the Supreme Court has continually repudiated". Judge Clark wrote, in pertinent part, as follows (App. pp. 37-38):

"We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing * * * By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very *evil* which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U. S. 203, 258; *Palermo* v. *United States*, 360 U. S. 343, 346; *Jencks* v. *United States*, 353 U. S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and *correction must come from the Supreme Court*. Thus I reluctantly concur in the affirmances here noted."

Certiorari should be granted to forever remove the *evil* mentioned above.

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* Refers to pages of Cardillo Appendix.

POINT II

This Court should settle the rule whether certain reports were improperly withheld from petitioner.

At the time of the testimony of Ohrynowicz and some other witnesses certain F.B.I. reports were submitted by the prosecutor to the trial court on the ground that they were not statements to which the defense counsel were entitled under Section 3500, Title 18, U. S. C. The trial court, after reading these reports, concurred with the prosecutor and ordered these documents sealed as court exhibits (see e.g., R. 648, Court Exhibit 14).

Since defense counsel were given no opportunity to examine these reports or to know any of their contents or anything about the manner of their preparation, appellant has no way of knowing whether their withholding was proper or not. If there was any question as to whether these reports fell within the definition of "statements" provided in Section 3500(e), then the trial court had a duty to conduct an inquiry into the facts and circumstances surrounding their preparation. *Campbell* v. *U. S.*, 365 U. S. 107 (1961); *U. S.* v. *McKeever*, 271 F. 2d 669 (2nd Cir., 1959).

Unfortunately, this placed the burden upon the Court below and requires this Court to determine the propriety of the trial court's action in withholding these documents from defense counsel, since we cannot tell what their contents are or what bearing they had, if any, upon the testimony of the witnesses involved.

From all of the foregoing it appears that the Court below was either unaware of or overlooked the controlling case law of the Second Circuit as hereinabove enunciated. Moreover, since the foregoing decisions of the several states are

in conflict with one another, it is incumbent upon this Court to resolve this conflict to create a consistent rule or yardstick. The case at bar is deemed so important and epitomizes the myriad problems which beset the field of "due process" deprivations. This Court should precisely set forth the basis upon which the Federal tribunals predicate their interpretation of the Jencks' Act; 18 U. S. C. §3500 so that a judge and/or prosecutor may not employ one or more of these doctrinal devices, referred to herein (App. p. 38), which would unjustly enable an appellate Court to affirm an appealed conviction. Therefore, this Court should assume jurisdiction and grant the writ of certiorari.

CONCLUSION

The petition for certiorari should be granted for the reasons relied on hereinbefore.

Respectfully submitted,

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Dated: June 20, 1963.

APPENDIX

Opinion by Moore, *Circuit Judge*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 365—September Term, 1961

(Argued June 7, 1962 Decided April 24, 1963)

Docket No. 27299

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN CARDILLO, LAWRENCE HARRIS, RALPH KAMINSKY, JOHN KNAPP, LOUIS MARGOLIS, and LOUIS PISELLI,

Defendants-Appellants.

Before:

CLARK, WATERMAN and MOORE, *Circuit Judges.*

* * * * *

MOORE, *Circuit Judge*:

Appellants were all in some way involved in the interstate transportation and sale of furs stolen from the Zwerdling fur shop in Paterson, New Jersey. The indictment was in four counts. Piselli and Knapp were convicted on Count One of transporting stolen goods in interstate commerce, 18 U. S. C. § 2314, and on Count Two of conspiring to transport stolen goods in violation of § 2314. All appel-

lants were convicted on Count Three of receiving goods which were moving in interstate commerce knowing the same to have been stolen, 18 U. S. C. § 2315, and on Count Four of conspiring to receive goods in violation of § 2315. Knapp was sentenced to concurrent ten-year terms on Counts One and Three and concurrent two-year terms on Counts Two and Four; the sentences on Counts Two and Four are to be served consecutively to the sentences on Counts One and Three. Piselli was sentenced to concurrent sentences of ten years on Counts One and Three and two years on Counts Two and Four. Harris and Margolis were sentenced to concurrent four-year sentences on Counts Three and Four. Cardillo received concurrent five-year sentences on Counts Three and Four. Ralph Kaminsky was sentenced to six years on Count Three and five years on Count Four, both sentences to be served concurrently.

The major part of the government's case was supplied by the testimony of Thaddeus Ohrynowicz and Max Friedman, both of whom testified to having a part in the criminal plan.

Ohrynowicz testified that Knapp approached him about taking part in a burglary in New Jersey and that, after examining several possibilities, they decided to rob the Zwerdling fur shop in Paterson, New Jersey. After surveying the store area on September 17, 1960, they concluded that they would need the assistance of a lock man. When they returned to New York that night, they communicated with Piselli, a lock expert, and he agreed to work with them. The following day, Sunday, September 18th, Knapp, Ohrynowicz and Piselli drove from New York City to Paterson and, after picking up tools at a garage that they had rented, they proceeded to Zwerdling's. They secured entrance to the fur shop by breaking into a dentist's office above the shop and drilling a hole through the floor into

the store below. As Piselli and Ohrynowicz were leaving with the furs, on their way to join Knapp at the car, they were accosted by residents of the building who demanded to know what was in the bags that they were carrying. Piselli and Ohrynowicz fled in different directions and, in his flight, Ohrynowicz dropped the bags of furs that he was carrying. Piselli managed to meet Knapp and put the furs, which he was carrying, in the car. Knapp drove the car back to New York, Piselli and Ohrynowicz each returned to New York separately. That night, after his return from New Jersey, Ohrynowicz met Cardillo in a bar in New York and told him of the Zwerdling robbery. After a short time Knapp joined them and told them that he had left the furs in a locker at the Port Authority Bus Terminal in New York City. Knapp, Ohrynowicz and Cardillo then drove in the latter's car to the terminal and got the furs which Cardillo and Ohrynowicz took to Ohrynowicz's hotel room.

On Tuesday, September 20, 1960, Knapp told Ohrynowicz that Nicholas Sten[1] had found a man named Lou (later identified as Margolis) who was willing to purchase the furs for $7,500. On the following day, Sten called Margolis and arranged for him to meet Ohrynowicz that day. At this meeting Margolis asked for some time to think over the purchase. They met again the following day. Margolis then agreed to take the furs but told Ohrynowicz that he could not pay for them until he sold them. On Saturday, September 24th, Ohrynowicz delivered the furs

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[1] Sten was convicted along with the appellants in this case and filed a notice of appeal. However, he did not file an appeal or a brief or participate in the oral argument. Therefore, we have not considered the merits of his appeal and it will remain pending. This action is without prejudice to the government's right to move to dismiss the appeal for failure to prosecute.

to Margolis at his place of business. On the following Tuesday Sten delivered $4,000 to Ohrynowicz who divided it, giving two-thirds to Knapp (presumably one-third was for Piselli) and keeping one-third for himself. On Friday, September 30th, Sten delivered $3,500 to Ohrynowicz who, after deducting $300 to cover the payment of $150 each to Sten and Cardillo, made the same division of the remainder.

Friedman testified that on September 20, 1960, Harris told him that he had an opportunity to buy some stolen furs, which he later stated came from the Zwerdling store in Paterson, New Jersey, and asked if Friedman could lend him some money for the purchase. About a week later, Harris told Friedman that Margolis offered him the furs for $7,500 and that he was going to meet Margolis and pick up the furs. When they met later the same day at Harris's house Harris had the furs and asked Friedman for a loan of $5,000. Friedman then went out to obtain the $5,000. Upon his return, he gave it to Harris. Harris then said that he had to go to meet Margolis but he told Friedman to return later that evening. Friedman returned and met Harris at about ten P. M. and at about one A. M. Ralph Kaminsky arrived. Kaminsky agreed to pay $250 each for 28 of the fur pieces and the three men took the furs and put them in Kaminsky's car.

The first question to be considered is whether the assertion of the privilege against self-incrimination by Ohrynowicz and Friedman during cross-examination so limited appellants' right to cross-examine the witnesses against them that the convictions should be reversed. After having been instructed by the judge that he could refuse to answer questions if the answers would tend to incriminate him under state or federal law, Ohrynowicz refused to answer several questions by defense counsel relating to prior crim-

inal activity unrelated to the crime at issue. Friedman was also instructed that he had a right to refuse to answer questions if the answers would incriminate him, and he refused to answer questions concerning the source (other than a "friend") of the $5,000 that he allegedly lent to Harris to finance the purchase of the furs from Margolis.

The right of a defendant in a federal court to confront the witnesses against him, guaranteed by the Sixth Amendment, includes the right to test the truth of those witnesses' testimony by cross-examination. *Greene* v. *McElroy*, 360 U. S. 474, 496-96 (1959); see *In re Murchison*, 349 U. S. 133 (1955); *In re Oliver*, 333 U. S. 257 (1941); *Alford* v. *United States*, 282 U. S. 687 (1931); *Kirby* v. *United States*, 174 U. S. 47 (1898). The importance of cross-examination in our jurisprudence has been well stated by Professor Wigmore:

> "It is beyond any doubt the greatest legal engine ever invented for the discovery of truth. However difficult it may be for the layman, the scientist, or the foreign jurist to appreciate this, its wonderful power, there has probably never been a moment's doubt upon this in the mind of a lawyer of experience." (5 Wigmore, Evidence § 1367 (3d ed. 1940).)

Since the right to cross-examine is guaranteed by the Constitution, a federal conviction will be reversed if the cross-examination of government witnesses has been unreasonably limited. *E.g.*, *Alford* v. *United States*, *supra*; *United States* v. *Masino*, 2 Cir. 1960, 275 F. 2d 129; *United States* v. *Lester*, 2 Cir. 1957, 248 F. 2d 239. However, reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the

witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege against self-incrimination during cross-examination may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him. *United States* v. *Kravitz*, 3 Cir. 1960, 281 F. 2d 581; *Hamer* v. *United States*, 9 Cir. 1958, 259 F. 2d 274; *United States* v. *Toner*, 3 Cir. 1949, 173 F. 2d 140. On the other hand, if the witness by invoking the privilege precludes inquiry into the details of his direct testimony, there may be a substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness's testimony should be stricken in whole or in part. *Montgomery* v. *United States*, 5 Cir. 1953, 203 F. 2d 887; *cf. United States* v. *Andolschek*, 2 Cir. 1944, 142 F. 2d 503; *Stephan* v. *United States*, 6 Cir. 1943, 133 F. 2d 87; *United States* v. *Keown*, W. D. Ky. 1937, 19 F. Supp. 639.

The district court was not in error in refusing to strike Ohrynowicz' testimony. After admitting to a substantial criminal record, Ohrynowicz invoked the privilege against self-incrimination when asked whether he committed other crimes in the past and whether he was guilty of certain crimes with which he was then charged in the state courts. These questions were purely collateral for they related

solely to his credibility as a witness and had no relation to the subject matter of his direct examination. Since the trial court was aware of his substantial criminal record and the pendency of other criminal actions against him, the defendants were not prejudiced by Ohrynowicz' assertion of the privilege and, therefore, there was no need to strike his testimony. *United States v. Kravitz, supra; Hamer v. United States, supra; United States v. Toner, supra.*[2]

HARRIS and KAMINSKY

Defense counsel's motion to strike the testimony of Max Friedman because of his refusal on Fifth Amendment grounds to answer questions concerning the source of the $5,000 that he allegedly gave Harris to use for the purchase of the stolen furs presents a much more troublesome problem. Friedman's testimony comprised practically the entire case against Harris and Kaminsky. He testified that Harris had told him "that he (Harris) had a chance to buy a lot of clipped [stolen] furs", that the asking price was $9,000 which he thought was too much, that "he was going to wait to see if he can get them cheaper" and asked was he [Friedman] in a position to help him by loaning him some money if he consummated the deal. Friedman testified further that he had been at Harris's house a week later on which occasion Harris told him that he had bought the furs for $7,500 and that he had asked Friedman if he had

[2] There is some question whether it was proper for the trial judge to hold that Ohrynowicz was entitled under the Fifth Amendment to refuse to answer questions if the answers would incriminate him only under state law. *Compare United States v. Murdock*, 284 U. S. 141 (1931), with *Ullman v. United States*, 350 U. S. 422 (1956), *Ballman v. Fagin*, 200 U. S. 186 (1906), and *United States v. Saline Bank*, 1 Pet. 26 U. S. 100 (1828). We do not have to decide this question, however, because appellants were not prejudiced by Ohrynowicz assertion of the privilege.

the money. Friedman said that he left and returned with $5,000 which he gave to Harris. After some cross-examination concerning his financial resources (which tended to show that he was not a man who would be expected to have a sum as large as $5,000 at hand), Friedman said that he had borrowed the money from a friend. When the defense attorneys attempted to cross-examine him further on the source of the $5,000, he invoked the privilege against self-incrimination.

Whether the witness's refusal to answer followed by the trial court's failure to strike the witness's testimony, or at least that portion thereof relating to the subject matter under inquiry, constitutes reversible error requires an analysis of the purpose of the inquiry and the role which the answer, if given, might have played in the defense. The defendants primarily affected are Harris and Kaminsky.

Kaminsky's counsel argued that if he could prove that Friedman had not borrowed the $5,000 from a friend "his [Friedman's] credibility as a witness falls". Counsel for Harris and Kaminsky, respectively, moved to strike Friedman's entire testimony. The trial court denied the motion saying, "I make it a practice not to strike any testimony * * *". Approaching the question from the "credibility"

This remark may have been made in reference to the court's practice in non-jury trials in which proper weight can be given to all testimony and the relevant sifted from the irrelevant. In jury trials and, particularly, in multi-defendant cases with conspiracy counts, it is often necessary to receive testimony subject to connection or subject to a motion to strike. If not connected, or if connected only to one or more of many defendants, a motion to strike as to other defendants or instructions to disregard would appear to be in order. The effectiveness of such procedures after the testimony has been heard by the jury has been the subject of speculation, metaphysical and otherwise, by jurists and trial lawyers for generations. However, in multi-defendant trials our jury system compels reliance upon the jury's ability to follow and act upon the judge's instructions as to the applicable law and with respect to individual defendants the applicable evidence.

point of view, the trial judge had heard ample testimony damaging to Friedman's credibility. To the court it was "obvious he is a burglar" which comment Friedman immediately confirmed by saying, "Yes, my business is a burglar." A further attack on Friedman's credibility might well be regarded as surplusage or cumulative and the refusal to strike would have been wholly justified.

However, resolution of the question is not quite so simple. The $5,000 was to enable Harris to buy the furs. Friedman in his testimony said that he had put this amount into Harris's hands. This financial transaction was not collateral but directly related to Harris's participation in the conspiracy and to Friedman's being present on the various occasions as to which he testified against Harris and Kaminsky.

Had Friedman disclosed the name of the lender, there would have been several possibilities. The lender might not have been available as a witness, he might have confirmed the loan, he might have denied making it or the defense might have been able to introduce other proof to show that the alleged lender could not possibly have made the loan. If the proof were sufficiently convincing to induce a belief that the loan had never been made, the court's reaction to all of Friedman's testimony might have been so adverse that it would have accepted no part thereof. Disclosure of a direct lie relating to the events testified to might have had far more influence on the court's ultimate decision than testimony merely establishing the unsavory character of the witness by admissions of prior crimes.

This is not to say that every refusal to answer by a witness, claiming his constitutional right against self-incrimination, requires the striking of his testimony or a part thereof. There would appear to be at least three

categories to be considered. The first would be one in which the answer would have been so closely related to the commission of the crime that the entire testimony of the witness should be stricken. The second would be a situation in which the subject matter of the testimony was connected solely with one phase of the case in which event a partial striking might suffice. The third would involve collateral matters or cumulative testimony concerning credibility which would not require a direction to strike and which could be handled (in a jury case) by the judge's charge if questions as to the weight to be ascribed to such testimony arose. As to the first and second categories suggested, whether all or a part of the testimony should be stricken, must depend upon the discretion of the trial judge exercised in the light of the particular circumstances. Unsatisfactory as such a generality is for a trial judge who is required to give instantaneous rulings on close questions and who does not enjoy the luxury of reflective appellate deliberation, any set of specific dogmas would be even more unworkable.

In this case, despite the original claim that his proposed cross-examination related to "credibility," it was not the type of testimony that would have developed the general unsavory character of the witness as might questions dealing with prior convictions. The answers solicited might have established untruthfulness with respect to specific events of the crime charged. It is in this field that the decisions appear to call for the striking of testimony.[4]

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[4] In a situation such as this we might do well to recall the admonition of Mr. Justice Stone in *Alford* v. *United States*, *supra*, at 692:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity

The ground given is not so much that credibility is involved but that refusal to answer thwarts a fundamental right of the defendant to cross-examine his accusers. The refusal of Friedman to answer falls into this category and for this reason the judgments of conviction against Harris and Kaminsky must be reversed. Since a new trial of these two defendants may be forthcoming, we think it wise to discuss their other contentions.

Both Harris and Kaminsky assert that the government failed to prove that the furs were "moving as, * * * a part of, or * * * constitute[d] interstate commerce" when they received them. They claim that by the time the goods reached them they were no longer in interstate commerce and, therefore, they were not guilty of a federal crime.

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to place the witness in his proper setting and put the weight of his testimony and credibility to a test, without which the jury cannot fairly appraise them * * *. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

Somewhat analogous is *Montgomery* v. *United States*, 5 Cir. 1953, 203 F. 2d 887, in which the court reversed a tax-evasion conviction because the defendant, who was charged with not reporting as income money that he received as bribes, was precluded because of the witness' right not to answer questions that would incriminate him from cross-examining a government witness, who testified that he gave a bribe to the defendant, about bribes that he might have paid to others. The court said:

"Cross-examination of a witness is a matter of right. *Alford* v. *United States of America*, 282 U. S. 687, 691, 51 S. Ct. 218, 219, 75 L. Ed. 624. *See J. E. Hanger, Inc.* v. *United States*, 81 U. S. App. D. C. 408, 160 F. 2d 8; *Dennis* v. *United States*, 8 Cir., 299 F. 496. Indeed, cross-examination, as has been often observed, is the surest test yet devised of the truthfulness of a witness' testimony, and its allowance is especially important in the case of a witness who is himself an admitted violator of the law."

In attempting to show that the purchases were purely intrastate transactions, they emphasize the fact that the furs had been in New York for several days before they received them and that they got the furs from Margolis who had originally received them from the thieves.

When the original conspiracy to steal and transport goods in interstate commerce contemplates the eventual sale of the goods to an innocent purchaser, the goods continue in interstate commerce until they reach that destination and anyone who purchases the goods from one in the conspiracy knowing that they were stolen and transported in interstate commerce becomes part of the conspiracy. *Roberson* v. *United States*, 5 Cir. 1956, 237 F. 2d 536; *Wilkerson* v. *United States*, 7 Cir. 1930, 41 F. 2d 654; *cf. Pilgrim* v. *United States*, 5 Cir. 1959, 266 F. 2d 486; *Schwachter* v. *United States*, 6 Cir. 1956, 237 F. 2d 640. In such a case it is for the trier of fact to determine whether the interstate character of the transaction has been established. In this case the evidence was sufficient to support the inference that the original plan encompassed the eventual sale to an innocent purchaser and that Harris and Kaminsky had the requisite knowledge of the theft and interstate transportation.

KNAPP

There is no merit to Knapp's claim that there was not sufficient evidence to support his conviction. The evidence shows that he participated in the burglary, drove the stolen goods to New York, was active in the effort to obtain a purchaser for the furs, and shared in the proceeds of the sale. He claims that the part of Ohrynowicz' testimony relating to what he told Ohrynowicz was hearsay, but these statements were admissible against him as admissions and

acts in furtherance of the conspiracy. 4 Wigmore, Evidence §§ 1048, 1079 (3d ed. 1940).

PISELLI

Piselli claims that his conviction must be reversed because the government failed to prove that he knew, when he participated in the robbery, that the furs were to be transported in interstate commerce, or that he had any part in the conspiracy to receive the stolen goods. While there is no direct evidence to show that Piselli knew of the interstate character of the theft, there is sufficient circumstantial evidence to support the conclusion that he had such knowledge. See *Schwachter* v. *United States*, 6 Cir. 1956, 237 F. 2d 641. He was in New York when he was first approached about taking part in the robbery; he knew that the robbery was to take place in New Jersey; he drove from New York to New Jersey with the other participants in the crime the morning of the robbery; he started back with Knapp but left the car to look for Ohrynowicz and not finding him returned directly to New York after the robbery. Since there was sufficient evidence to sustain Piselli's conviction on the illegal transportation counts, we need not consider whether there was sufficient evidence to sustain his conviction on the receiving counts because all the sentences are concurrent. *Lawn* v. *United States*, 355 U. S. 339, 362 (1958); *United States* v. *Mont*, 2 Cir., 1962, 306 F. 2d 412.

CARDILLO

The evidence against Cardillo is sufficient to support his conviction. He accompanied Knapp and Ohrynowicz to the Port Authority Terminal to pick up the furs; he attempted to find a buyer for the furs; and he shared in the proceeds of their sale.

Cardillo requested that we examine certain statements by government witnesses that were not turned over to the defense pursuant to their request under 18 U. S. C. § 3500, but which were presented to the court for in-camera inspection. We have examined these statements and find that the defense was not entitled to their production.

To avoid any confusion as to the materials from the prosecutor's files which were given or shown to defendants' counsel during the trial, on January 21, 1963, by an order to supplement the record, we requested the trial judge to indicate which of the papers in the envelope sealed during the trial (a) were admitted in evidence at the trial; (b) were delivered to defense counsel for examination before or during the trial; and (c) by order of the court were not shown to the defense during the trial. Judge Murphy promptly reported on January 30, 1963. His report lists (A) transcript of grand jury testimony and F.B.I. reports and statements (17 exhibits in all) given to defense counsel during the trial; (B) F.B.I. reports, statements and certain handwritten material which were marked for identification but not given to counsel for any of the defendants on the ground that they did not come within the purview of section 3500 of Title 18, U. S. C., were seen only by the Court and ordered to be sealed, some of which singly or collectively were marked as Court's exhibits.

To determine whether there was reversible error in the trial judge's rulings with respect to the material in category B, this court has examined all the papers.

It is, of course, settled that if the defense is entitled to production of a statement, "it is not for us to speculate whether they could have been utilized effectively." *Clancy v. United States*, 365 U. S. 312, 316 (1961). The question before us, however, is whether the statement in question "related to" the direct testimony of the witness. The

statement must relate generally to the events and activities testified to. *Jencks* v. *United States*, 353 U. S. 657 (1957); *Ogden* v. *United States*, 303 F. 2d 724 (9th Cir. 1962). Thus, if the statement deals only with the witness's general background and personal history and does not deal with the events and activities testified to on direct examination, it is not producible under the Act. *Ogden* v. *United States*, *supra*. In *United States* v. *Simmons*, 281 F. 2d 354 (2d Cir. 1960), a prosecution for bank robbery, we approved the action of a trial judge in withholding from defense counsel a statement of a bank officer reciting that he had not packaged any twenty dollar bills immediately prior to the robbery and that as a rule he did not handle or package money in the course of his duties, as the statement did not relate to the subject matter of the witness's testimony on direct examination as he had testified only to the events on the day of the robbery. Statements that did relate to Ohrynowicz's testimony at trial, those describing the preparation for and perpetration of the crime and the efforts to dispose of the furs, were turned over to the defense. The defense was given two lengthy reports of statements by Ohrynowicz to the F.B.I. and Ohrynowicz's Grand Jury testimony.

The statements which were not turned over related primarily to a loan made by Ohrynowicz to Sten, who is not before us on this appeal and to Ohrynowicz's activities during the summer of 1960, namely, in June, July and August, prior to the September 18th robbery. The statements do not deal with testimony adduced from Government witnesses on direct examination which affects the appellants herein. They concern themselves largely with

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Although Cardillo was only one of the appellants who requested that we examine these statements, we have determined that none of the appellants were entitled to receive these statements.

Ohrynowicz's source of income during the summer which he claimed was shoplifting.

In view of the large amount of material turned over by the prosecution to defense counsel, including Ohrynowicz's statements dealing with his planning of, and participating in, the crime in question, there was no error in the exercise of the trial court's judgment in not turning over collateral matter which did not relate to the events and activities testified to by the witness. The trial judge was in a position to grasp the significance of the testimony of the government witnesses and was in the best position to determine which reports and statements related to their testimony and which were incidental or collateral. His decision is not to be overturned unless clearly erroneous. *Palermo* v. *United States*, 360 U. S. 343 (1957); *Hance* v. *United States*, 299 F. 2d 389 (8th Cir., 1962).

As to the reports or statements of Agent Bergholtz, his testimony occupies four-and-one-half pages of the record. He stated that he and other agents arrested Sten on October 20, 1960, and that a search of Sten's residence at that time uncovered a card with Ohrynowicz's address written on it. His testimony related to no other defendant. It is inconceivable that any other defendant could have had the slightest interest in impeaching Bergholtz with respect to the details of his arrest of Sten.

In our opinion, the decision of the trial court that the documents in question were not within the purview of section 3500 was not clearly erroneous. This conclusion is supported by our own independent examination of the same documents.

MARGOLIS

Margolis' conviction is supported by testimony other than that of Friedman. His claim that his conviction of

conspiracy cannot stand because the government failed to prove that he had knowledge of the interstate shipment of the furs is not well founded because such knowledge is not necessary to sustain a conviction on the ground of receiving stolen goods which are moving in interstate commerce. 18 U. S. C. § 2314. Since Margolis' sentence on the conspiracy count is concurrent with the sentence on the receiving count, the judgment below can be sustained, even if the conspiracy conviction was improper. *Lauer v. United States, supra; United States v. Mont, supra.* There is no merit in Margolis' claim that the fact that government agents spoke to him on two different occasions after he was indicted and on one occasion between the time of arrest and indictment in the absence of his counsel requires reversal of his conviction. The government did not introduce any statements made during these interviews and the agents' actions did not interfere with Margolis' right to counsel.

The judgments of conviction of Harris and Kaminsky are reversed; the judgments of conviction of all other appellants are affirmed.

CLARK, *Circuit Judge* (concurring in the result):

We seem generally unwilling to upset convictions when the Jencks Act, 18 U. S. C. § 3500, has not been scrupulously observed by the prosecution and the trial court. This tendency is disturbing. Several doctrinal devices have been developed to this end, such as that enunciated in *United States v. Annunziato*, 2 Cir., 293 F. 2d 373, 382, cert. denied *Annunziato v. United States*, 368 U. S. 919, that it is only "harmless error" not to produce a statement which appears to "corroborate" a witness's testimony, or

in *United States* v. *Simmons*, 2 Cir., 281 F. 2d 354, 357-358, and the present case that the defense is not entitled to statements relating to purely incidental or collateral aspects of a witness's testimony, or in *United States* v. *Aviles*, 2 Cir., March 8, 1963, that the defense is not entitled to statements not sufficiently exact, though to the district judge "probably verbatim," recitals of the witness's oral statements. By employing one or more of these doctrinal devices the court is enabled to affirm an appealed conviction. Nevertheless this means that the speculation of the trial court is again being substituted for the judgment of defense counsel in assessing a statement's worth as an aid to cross-examination. It is this very evil which the Supreme Court has continually repudiated. See *Scales* v. *United States*, 367 U. S. 203, 258; *Palermo* v. *United States*, 360 U. S. 343, 346; *Jencks* v. *United States*, 353 U. S. 657, 668-669. But these doctrinal devices for achieving affirmance in the face of Jencks Act noncompliances are sufficiently entrenched that exception should not be made in individual cases and correction must come from the Supreme Court. Thus I reluctantly concur in the affirmances here noted. I concur in the reversals of the Harris and Kaminsky convictions and in the opinion so far as it relates to these matters.

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OCTOBER TERM, 1963

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JOHN CARDILLO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 221

LOUIS MARGOLIS, PETITIONER

v.

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No. 300 Misc.

LOUIS PISELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 316 F. 2d 606.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1963. On May 15, 21 and 27, respectively, Mr. Justice Harlan extended the time for filing petitions for writs of certiorari by Cardillo and Margolis to June 22, 1963, by Piselli to June 22, 1963, and by Knapp to June 24, 1963. Separate petitions for writs of certiorari were filed by Cardillo and Margolis on June 20, 1963, and by Knapp on June 21, 1963. The petition for a writ of certiorari by Piselli was filed out of time on June 26, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the refusal of two principal government witnesses during cross-examination to answer certain questions on the ground of self-incrimination unduly restricted petitioners' right of cross-examination (Nos. 218, 221, 300 Misc.).

2. Whether the trial court erred in finding that certain statements did not relate to the subject matter of direct examination of a key government witness and, therefore, were not subject to production under 18 U.S.C. 3500 (Nos. 218, 221, 279 Misc.).

3. Whether conversations between government agents and petitioner Margolis, subsequent to a statement given at the time of arrest, deprived Margolis of the assistance of counsel, where the government did not seek to use these conversations as evidence against him (No. 221).

4. Whether the evidence is sufficient to sustain the conviction of petitioner Piselli (No. 300 Misc.).

STATUTE INVOLVED

Section 3500 of Title 18 provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement

relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall exercise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. * * *

* * * * *

STATEMENT

Petitioners and eight others were charged in a four-count indictment returned in the Southern District of New York with offenses arising out of the theft of furs. Count 1 charged the transportation in interstate commerce of stolen furs of a value of more than $5,000. Count 3 charged the knowing receipt

and concealment of the stolen furs. Counts 2 and 4 charged conspiracies to commit the substantive offenses charged in the other counts. Petitioners Knapp and Piselli were charged in all counts and petitioners Cardillo and Margolis were charged in counts 3 and 4 (I A. 1-4).[1] Following a trial before Judge Murphy (a jury having been waived), petitioners were convicted as charged. Cardillo was sentenced to concurrent terms of five years' imprisonment and Margolis to concurrent terms of four years' imprisonment. Knapp was sentenced to a total of twelve years' imprisonment—10 years on counts 1 and 3, and 2 years on counts 2 and 4. Piselli was sentenced to concurrent terms of imprisonment—10 years on counts 1 and 3, and 2 years on counts 2 and 4.

The evidence may be summarized as follows:

Thaddeus Ohrynowicz, a government witness, testified that on September 17, 1960, in New York City, petitioner Piselli agreed to assist him and petitioner Knapp in stealing furs from a furrier in Paterson, New Jersey (I A. 7-9; R. 465-469). On September 18, after driving from New York, they broke into a fur shop in Paterson (R. 473-500). Following the burglary, the three fled separately. Knapp carried some of the stolen furs in his automobile, taking them to a locker in New York (R. 500-506). That evening,

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[1] The record on file with the Clerk of the Court consists of the trial transcript, the original papers and proceedings in the district court and the appendices files in the court of appeals. The trial transcript is designated herein as "Tr.". The appendices are designated by "A.", preceded by volume number.

petitioner Cardillo, who knew of the theft, assisted Ohrynowicz in transporting the furs from the locker to a hotel where the latter was staying (II A. 40-42). Later that night, Ohrynowicz and Knapp met Piselli in front of a New York theatre (R. 510).

On Monday, September 19, Cardillo brought a prospective buyer to examine the furs at a second hotel to which Ohrynowicz had moved them (II A. 42-45). Later that week, defendant Nick Sten brought petitioner Margolis to view the furs and Margolis agreed to buy them from Ohrynowicz (II A. 45-49). On Saturday afternoon, September 24, Ohrynowicz brought two suitcases containing the furs to Margolis at the latter's place of business (II A. 49-50, 54-55). Sten, who said he had obtained the money from Margolis, gave Ohrynowicz $4,000, one day and $3,500 on the following day (II A. 51-52). Ohrynowicz divided the money into three equal parts, deducting $300 to pay Cardillo and Sten (R. 547-553).

ARGUMENT

1. Petitioners Cardillo (No. 218, Pet. 6-18) and Margolis (No. 221, Pet. 16-18) contend that the trial court should have stricken the testimony of key witnesses Thaddeus Ohrynowicz and Max Friedman after these witnesses refused on cross-examination to answer certain questions on the ground of self-incrimination. Petitioner Piselli (No. 300 Misc., Pet. 29-30) joins in this contention so far as the testimony of Ohrynowicz is concerned.

a. Ohrynowicz testified on direct examination both as to the burglary and the sale of the furs. On cross-

examination, he testified that he was arrested at 1:30 a.m. on October 1, 1960, and that this arrest resulted in other criminal charges of breaking and entering with intent to steal. After the court advised the witness that he could decline to answer questions about any crimes for which he had not been convicted, Ohrynowicz refused to answer whether he was "running away from another burglary" at the time of his arrest and whether he was "guilty of those crimes" (III A. 1-6). He also testified that between 1947 and 1954 he had been found guilty of robbery and attempted burglary (R. 443, 656) and that he had committed several burglaries during that period. He asserted the privilege against self-incrimination in relation to a question whether he had committed any burglaries between 1954 and 1960 (III A. 6-11).

The questions which Ohrynowicz refused to answer did not serve to limit appreciably his cross-examination and did not prevent petitioners from exploring the motives which actuated his testimony. Neither an admission nor denial of guilt of other offenses would have opened an avenue for further examination. If the witness had denied the commission of other offenses, a further inquiry into the truth of this statement would have been improper as collateral to the issues on trial. An admission that he was guilty of crimes of which he had not been convicted would have added little. The court knew, as the trier of fact, that the witness faced a pending state charge which might lead him to color his testimony. It also knew of his prior convictions and was thus in a position to take account of his reputation for probity.

b. Max Friedman testified that he gave $5,000 in cash to Lawrence Harris to enable Harris to buy the furs from Margolis (II A. 61). He said he obtained this money from a friend. When asked to name him, he claimed the privilege against self-incrimination, and this was sustained (II A. 73-75). The court of appeals reversed the convictions of Harris and Kaminsky (who was also implicated by Friedman) on the ground that, as to them, the sustaining of the privilege denied them the right of cross-examination on a material matter. It declined to reverse as to Margolis on the ground that his conviction rested on evidence other than that of Friedman. The argument of petitioner Margolis that this was error is refuted by the record.[2]

While Friedman did testify that Harris informed him that he was buying from Margolis furs which had been stolen in New Jersey, this was not the principal evidence against Margolis. The crucial evidence was (1) the testimony of Ohrynowicz as to the sale and delivery of the furs to Margolis (II A. 47-52); (2) the testimony of John Gatsonis that he saw the furs at Margolis' place of business, that Margolis gave him the two valises in which the furs were delivered and that Margolis told him to forget what he saw (II A. 54-55; R. 751); and (3) the statement that Margolis made to the FBI, at the time of his arrest, in which he admitted acquiring the furs

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[2] Cardillo (No. 218) also raises this point but he has no basis to complain since Friedman's testimony did not implicate him.

through Sten from an unknown individual and that he assumed the furs had been stolen. (II A. 100-105) These admissions, amply corroborated, were sufficient to establish the guilt of Margolis on the substantive count. The real significance of Friedman's testimony, so far as Margolis is concerned, was on the conspiracy count, *i.e.*, to show knowledge of the interstate transportation of the stolen furs. But on the substantive counts it was not necessary to show that Margolis knew that the stolen furs had been transported in interstate commerce so long as the goods were in fact in interstate commerce. See *United States* v. *Sherman*, 171 F. 2d 619, 623 (C.A. 2), certiorari denied, *sub. nom. Whelan* v. *United States*, 337 U.S. 931. Since interstate transportation was clearly proved, and since the corroborated admissions went to every other element of the offense, the substantive count was amply established before the trial judge, without regard to Friedman's testimony. That count alone will support the verdict. *Lawn* v. *United States*, 355 U.S. 339, 362.

2. On October 22, 1960, petitioner Margolis was arrested by F.B.I. agent Arthur S. Hamilton. Margolis gave him a statement detailing his involvement in the receipt of the furs and relating that, acting through defendant Nicholas Sten, he acquired the furs from an unknown individual (II A. 99-104). On November 18, 1960, Hamilton, in a 5 to 10 minute interview, asked Margolis if Ohrynowicz was the unknown individual and Margolis replied that he was not. At that time, Hamilton did not

know if Margolis had an attorney (II A. 121-122). The indictment was returned on November 22, 1960 (II A. 1). In February 1961, after telephoning Margolis and asking him if he could see him, Hamilton visited Margolis for 4 minutes. He wanted to know if Margolis and Sten were represented by the same attorney. The purpose of the visit was to determine if Margolis would appear as a government witness. Margolis said that his attorney had advised him that it was all right to speak to Hamilton (II A. 108-110, 112, 117, 122). On April 21, 1961, Hamilton again spoke to Margolis in a 10 to 15 minute conversation. He asked Margolis to testify for the government and told him that he himself would testify in court as to the statements made by Margolis on October 22 (II A. 110-111, 113, 118, 120, 122).

The contention of Margolis that the three conversations with F.B.I. agent Hamilton subsequent to to the day of his arrest interfered with his right to counsel or otherwise prejudiced him is without merit (No. 221, Pet. 9-14). The government did not rely on these conversations to establish guilt. It is not reasonable to suppose that these brief conversations could have had the effect here urged when Margolis did not appear as a government witness and there was no evidence that Margolis was so influenced that he was unable to follow the advice of his attorney. In any event, in the absence of pressure, there is nothing sinister when a government agent asks a de-

fendant if he will appear as a government witness.[3]

3. After Ohrynowicz concluded his direct testimony, the government turned over to the defendants a copy of his testimony before the grand jury and copies of statements made by him to the F.B.I. on October 20 and October 26, 1960. The government submitted to the court for its examination two documents which it refused to turn over to the defense on the ground that they did not relate to the subject matter of the direct examination (R. 555-558). The court examined these documents and concluded that they were not producible under 18 U.S.C. 3500 (R. 560, 648; Court's Exhibits 12, 13). The court of appeals, which examined the sealed documents, agreed with the conclusion of the trial judge.[4]

The procedure followed by the courts below was correct. The decision whether the statements related to the direct testimony of the witness was not allowed to rest with the government. In accordance with the statutory mandate, the United States Attorney turned over the statements to the district

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[3] Margolis' claim that he was denied the right to inspect the agent's interview log (Exhibit 37) showing the duration of the post-indictment conversations is refuted by the report of the trial judge to the court of appeals indicating that the log was turned over to defense counsel for inspection.

[4] The court below described the documents as follows:

"The statements which were not turned over related primarily to a loan made by Ohrynowicz to Sten; who is not before us in this appeal and to Ohrynowicz's activities during the summer of 1960, namely, in June, July and August, prior to the September 18th robbery. The statements do not deal with testimony adduced from Government witnesses on direct examination which affects the appellants herein".

court. After examination, the trial judge agreed that they were not relevant.

4. Petitioner Piselli's challenge to the sufficiency of the evidence is not an issue which calls for further review by this court (No. 300 Misc., Pet. 6-29). The total circumstances of the case—the planning of the burglary in New York, the trip from New York to New Jersey to commit the crime, the separate return of each of the three burglars to New York after the commission of the crime, the meeting between Piselli, Knapp and Ohrynowicz in New York following the transportation of the furs to New York—warranted the trial court's conclusion that Piselli had knowledge of the interstate character of the theft.[5]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JULY 1963

[5] Since Piselli received a concurrent sentence, it is not necessary to consider whether the evidence was sufficient to sustain his conviction on the receiving counts. *Lawn* v. *United States*, 355 U.S. 339, 362.

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OCTOBER TERM, 1963

No. 218

JOHN CARDILLO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI

Petitioner John Cardillo presents this petition for a rehearing of this Honorable Court's order dated October 14, 1963, denying the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, and, in support thereof, respectfully shows to this Honorable Court:

Grounds for Rehearing

The petitioner herein prays for a rehearing of the order denying his petition for a writ of certiorari based upon substantial grounds, pursuant to Supreme Court Rules, Rule 58(2). At the outset, the opinion of the Court of Appeals for the Second Circuit in the case at bar is reported below (*United States v. Cardillo*, 316 F. 2d 606) and is printed at pages numbered 21 to 38 inclusive of the "Appendix" in petitioner's original petition for a writ of certiorari.

Circuit Judge Clark, while concurring in the result which unanimously affirmed the District Court, reluctantly did so. It is respectfully submitted that this Court possibly overlooked Circuit Judge Clark's suggestion to this Court that "correction must come from the Supreme Court" (316 F. 2d 606 at 617).

Petitioner and others were prosecuted for interstate transportation of stolen furs, interstate receipt of stolen furs and for conspiracy to do the same. Petitioner was convicted and sentenced to concurrent terms of five years. He is presently free on bail pending final determination by this Court.

On October 21, 1963, this Court reversed a judgment of contempt in the case of *Panico* v. *United States* and directed the Court to hold a full and complete hearing on the question of Panico's sanity. In the *Panico* case, related to *United States* v. *Bentvena*, 319 F. 2d 916, 944 (1963), he was cited for contempt for committing numerous infractions in the courtroom during his retrial before the District Court and a jury. This Court held that he was not afforded an adequate sanity hearing. Moreover, Panico's judgment was reversed by the Court of Appeals for the Second Circuit on the ground that he did not waive his privilege to testify in his own behalf and denial of such privilege to testify required reversal (*United States* v. *Bentvena*, *supra*). Further, on October 21, 1963, this Court decided *Genovese* v. *United States*, wherein the Court ruled that in light of *Campbell* v. *United States*, 83 S. Ct. 1356 (1963), the *Genovese* case should be remanded to the Court of Appeals for the Second Circuit for further reconsideration on the question of the Government's failure or refusal to produce notes of an interview with a Government witness. In the *Campbell* case,

supra, this Court vacated the judgment of the Court of Appeals, First Circuit, and the judgment of conviction, and remanded the case for further proceedings consistent with the majority opinion. In the *Bentvena* case, currently pending before this Court on a petition for certiorari, the Government's witness, former F. B. I. Agent Rowan, admitted destroying his notes of the principal Government witness, a special employee, "to circumvent the Jencks decision" (see page "34" of Petition for a Writ of Certiorari as respecting petitioner Galante).

In the case at bar, petitioner Cardillo assigned as error the point that he was deprived of a fair trial by reason of the improper restriction of the cross-examination of the principal prosecution witness. This error occurred on two separate occasions during the trial: a) when the Trial Court instructed Government witness Ohrynowicz regarding the scope of his privilege against self-incrimination, and, b) when the Trial Court sustained prosecution's objections to defense counsel's interrogatories propounded to the said Government witness. Petitioner was the sole appellant who requested the Court of Appeals to examine the statements by Government witnesses that were not turned over to the defense pursuant to their request under Title 18, U. S. C. §3500, but which were presented to the Trial Court for *in-camera* inspection. Notwithstanding the Court of Appeals, Second Circuit, finding that after their examination of these statements the defense was not entitled to their production, it is respectfully submitted that in the light of *Genovese*, *supra*, a reexamination by this Court of the instant case should reveal that the petitioner was entitled to have these statements turned over to the defense for they came within the purview of §3500 of Title 18, U. S. C.

Petitioner's trial counsel was unduly and seriously impeded by the Trial Court when the Court volunteered advice to the principal prosecution witness to the effect that he may curtail the cross-examination by seeking refuge behind the shield of the Fifth Amendment which was improperly extended to him.

In a more recent case, *Goldstein* v. *United States*, Docket No. 28207, decided October 22, 1963, the Court of Appeals for the Second Circuit wrote a *per curiam* opinion:

> "We need not decide whether if Goldstein had taken the stand to rebut the inference of knowledge which his counsel might have expected the judge to allow the jury to draw from possession of goods that were in fact illegally imported, he might still be able to argue that his conviction was obtained through testimony that, on his view of the statute was *unconstitutionally compelled*; since he remained silent, it is clear that he lacks standing even on such a basis." (Emphasis supplied.)

In *Goldstein*, *supra*, the Court of Appeals rejected his contention that testimony was presented against him in violation of his constitutional rights. The Court's ruling was that since he failed to take the stand he could not be heard to complain of the unconstitutionally compelled testimony. In the case at bar, the defense timely and properly objected to the apparently erroneous rulings of the Trial Court, but these objections, too, were cast aside.

Similarly, petitioner was denied the right to the testimony of the Government's chief witness against him because said witness claimed his Fifth Amendment privilege during his cross-examination testimony against petitioner and, even then, the privilege was claimed at the Trial

Court's suggestion. All of this was violative of due process of law and in conflict with the decisional precedents of the respective Court of Appeals' Circuits.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

s/ FRANCES KAHN
Counsel for Petitioner
John Cardillo

Certificate of Counsel

I, FRANCES KAHN, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay nor for any ulterior purpose, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

s/ FRANCES KAHN
Counsel for Petitioner

Dated: October 30, 1963.